RECENT CASES.

AGENCY—TERMINATION—INSANITY—In an action for breach of contract on the part of the defendant's agent, the answer was that the defendant had become insane prior to the alleged breach by the agent, but it appeared that the defendant was sane when he authorized the agent to act in his behalf and it was clear that the plaintiffs in dealing with the agent had no knowledge of the defendant's insanity. *Held:* The insanity did not release the defendant from lability. Powell v. Batchelor, 179 S. W. 751 (Mo. 1915).

An agency created for the purpose of performing some specific act will be terminated upon the completion of that act. Atlanta Savings Bank v. Spencer, 107 Ga. 629 (1889); Newkirk v. Stevens, 152 N. C. 498 (1910). But where the agency requires a series of acts to complete it according to the intention of the parties, it will continue until the whole purpose is accomplished, unless revoked. Cleveland Railway Co. v. Closser, 126 Ind. 348 (1890); Gott v. Dinsmore, 111 Mass. 45 (1872). The authority of an agent, when not coupled with an interest, is terminated by the death of the principal, even though it may have been irrevocable in his lifetime. Hunt v. Rousmanier, 8 Wheat. 174 (U. S. 1823); Caursev v. Jackson, 159 Mich. 119 (1909); Frederick's Appeal, 52 Pa. 338 (1866). Thereafter, any transactions between the agent and third parties will in no way bind the estate of the principal, even though the parties had no knowledge of his death. Long v. Thayer, 150 U. S. 520 (1893); Loan and Trust Co. v. Wilson, 139 N. Y. 284 (1893); Clayton v. Merrett, 52 Miss. 353 (1876); *contra,* Cassiday v. McKenzie, 4 W. & S. 282 (Pa. 1842). Likewise, it is the general rule that the after occurring insanity of the principal operates as a revocation of the authority of the agent. Bunce v. Gallagher, 5 Blatch 481 (Cir. Ct. 1867); Hill v. Day, 34 N. J. Eq. 150 (1881); Renfro v. City of Waco, 33 S. W. 766 (Tex. 1896). It has been held, however, that insanity will not be equivalent to revocation unless first established by an inquisition. Wallis v. Manhattan Co., 2 Hall 495 (N. Y. 1849). If on recovery the principal fails to terminate the authority, it may be considered as a mere suspension, and he will be bound by prior acts of the agent. Davis v. Lane, 10 N. H. 156 (1839). In cases holding that insanity acts as a revocation, the incapacity must not be merely mental weakness, but must be such an unsoundness as renders the principal incapable of acting in matters to which the agents authority relates. Drew v. Nunn, 4 Q. B. 661 (Eng. 1879); Leggate v. Clark, 111 Mass. 308 (1873). It is well settled, however, that where third parties, in good faith and in ignorance of the principals insanity, rely on an apparent authority, they will be protected where the contract is fully executed and the parties cannot be restored to their original situations. Matteson v. McMahon, 38 N. J. L. 536 (1876); Merritt v. Merritt, 43 App. Div. 68 (N. Y. 1899).

ATTORNEY AND CLIENT—LIEN AS AGAINST THIRD PARTY—An attorney was retained by an indemnity company to defend a case against an employer, insured by the company. While the action was pending the company was dissolved. The attorney claimed a lien on the employer's papers in his hands for the money due him from the indemnity company for handling the case. *Held:* The attorney had no such lien. Everett, Clark and Benedict v. Alpha Portland Cement Co.; *In re* Alpha Portland Cement Co., 225 Fed. 931 (1915).

The general rule is that an attorney's lien upon papers in his possession is commensurate with his client's right to such papers; Jones, Liens, p. 146; and an attorney can have no lien on papers to which his client has no title. Hollis v. Claridge, 4 Taunt. 807 (Eng. 1813). The doctrine will be applied

even where the client is an agent, and the money obtained by the attorney will ultimately revert to the principal. McMath v. Mann's Bros. Boot and Shoe Co., 15 S. W. 879 (Ky. 1891). Nor will a lien attach to the property of a decedent for professional services rendered to an executor in the administration of the estate. *In re* Robinson, 125 App. Div. 429 (N. Y. 1908). On the other hand where one client is substituted for another by death or by operation of law, a lien on the papers of the latter can be maintained against the former. *Ex Parte* Buch, 7 Viner's Abr. 74 (Eng. 1734). So also an attorney has a lien against his real client in interest, though he uses the name of a nominal party. Tuttle v. Clafin, 88 Fed. Rep. 122 (1898).

At common law only the attorney's general or retaining lien was recognized; this is a mere passive lien on the papers and other property of the client in the attorney's possession, unenforceable by sale. Such a lien is not, however, limited to the services rendered in the particular matter in which the papers are received. Finance Co. v. Charleston C. &. C. R. Co., 46 Fed. 426 (1891); but is confined to debts due the attorney for professional services. Worrall v. Johnson, 2 Jac. & W. 214 (Eng. 1819). In America this lien is recognized by the courts in some of the states, McPherson v. Cox, 96 U. S. 404, 417 (1877); in others it rests upon statute. Georgia Code, 1911, p. 3364. The special or charging lien on a judgment obtained by the attorney was not recognized at common law, but is now generally given by statute. Cal. Code, p. 160. It is limited strictly to the amount due the attorney for services and costs in the particular suit, but can be enforced by active steps.

CARRIES CHANGE IN NATURE OF LIABILITY—WAREHOUSEMAN—A shipment of intoxicating liquor, billed to consignees not living at point of destination, was seized under process on the second day after arrival. *Held:* The reasonable time allowed to consignees for removal, before the liability of a railroad carrier ceases, had not elapsed. Daneiger v. Atchinson, T. & S. F. Ry. Co., 179 S. W. 800 (Mo. 1915).

There is a wide and irreconcilable conflict concerning when the liability of a common carrier by rail as a carrier ceases and its liability as a warehouseman begins. In some states the latter liability begins as soon as the carrier has unloaded and stored the goods. Georgia & A. Ry. v. Pound, 36 S. E. 312 (Ga. 1900); Hicks v. Wabash Ry. Co., 108 N. W. 534 (Iowa 1906); Sessions v. Western R. Corp., 82 Mass. 132 (1860). The majority of states, however, hold that the liability as carrier continues until the consignee has had a reasonable time to remove the goods. Black v. Ashley, 44 N. W. 1120 (Mich. 1890); Moses v. B. & M. R. Co., 32 N. H. 523 ((1855); Moyer v. P. R. R., 31 Pa. Super. 559 (1906). Some states following the latter rule hold that notice to the consignee is necessary before the period of reasonable time for removal starts to run. Walters v. Detroit Union R. Co., 102 N. W. 745 (Mich. 1905); Becker v. P. R. R., 96 N. Y. Supp. 1 (1905). Others do not require such notice. Schumacher v. Chicago & N. W. Ry. Co., 69 N. E. 825 (Ill. 1904); Moses v. B. & M. R. Co., *supra;* Berry v. W. Va. R. Co., 30 S. E. 143 (W. Va. 1898). However, the existence of an established custom at point of destination may require notice even in those jurisdictions not requiring it ordinarily. Columbus R. Co. v. Ludden, 7 So. 471 (Ala. 1890); Frank v. Grand Tower R. Co., 57 Mo. App. 181 (1894). Likewise notice may not be required by custom in those jurisdictions following the *contra* rule. Gibson v. Culver, 17 Wend. 305 (N. Y. 1837); Roberts v. Union Line Express Co., 2 Ohio Dec. (Reprint) 577 (1860). What is a reasonable time for removal must depend largely upon the circumstances of each particular case. Poythress v. Durham R. Co., 62 S. E. 515 (N. C. 1908). But generally the question is not affected by adventitious circumstances peculiar to a particular consignee. Hedges v. Hudson R. Co., 49 N. Y. 223 (1872); Moses v. B. & M. R. Co., *supra.* On this point the principal case seems to be at variance with the weight of

authority. As to notice, when an interstate shipment is involved, it is well to note that all regulations affecting the value of the service rendered under a rate must be included in the tariffs filed with the Interstate Commerce Commission. B. & M. R. Co. v. Hooker, 233 U. S. 97 (1913). Also the bills of lading now used by the railroads usually provide for notice.

CONTRACTS—BREACH—MEASURE OF DAMAGES—In an action for the breach of a contract for the sale of an electric generator, the vendor introduced evidence that the generator was specially manufactured to fill the vendee's order. Thereupon the latter offered to show that the generator was a staple article of commerce having an established market value and a ready sale. This offer was rejected. *Held:* The evidence should have been admitted. Manhattan City and Interurban Ry. Co. v. General Electric Co., 226 Fed. 173 (1915).

The measure of damages for the breach of a contract of sale of personal property where the goods are staple and have a known market value is the difference between the market price and the contract price. Malcomson v. Reeves Pulley Co., 167 Fed. 939 (1909); 2 Sedgwick on Damages (9th Ed.), pp. 752, 1568. Where, however, the article is of special manufacture, or is rendered valueless by the buyer's breach of his contract, the measure of damages is the full value of the article. Ballentine v. Robinson, 46 Pa. 177 (1863); Roswell Nursery Co. v. Mielenz, 137 Pac. 579 (N. M. 1914); Coburn v. Cal. Portland Cement Co., 144 Cal. 811 (1904). Whether an article is of standard or special make cannot be determined wholly by the form of the contract of sale, as the specifications therein may be inserted merely to identify the article as of a particular class. In such cases the weight of authority holds with the principal case that the opinions of the parties and the testimony of experts as to the marketability of the goods may be introduced. Barnes v. Morrison, 97 Va. 372 (1899); but they have little evidential value where more cogent means of proof are available. Staab v. Borax Soap Co., 55 Pac. 618 (Col. 1898); The Albert Dumois, 177 U. S. 240 (1900). The actual facts of the manufacture of the article in dispute, trade statistics, a prior sale, *etc.*, form the best index in such circumstances, The Albert Dumois, *supra*.

CORPORATIONS—RECEIVERSHIPS—PRIORITY OF CLAIMS—A receiver appointed to take charge of the affairs of an insolvent corporation issued certificates to cover expenses incurred in the management of the property. The question was whether such claims were superior to mortgages recorded before the certificates were issued. *Held:* The mortgages are entitled to priority. First State Bank v. Farmers Gin Co., 178 S.W. 1015 (Ky. 1915).

The cases show no dissent from the proposition that in appointing a receiver for a railroad the court has power to authorize him to issue receiver's certificates for liabilities incurred in the management and preservation of the property and that such certificates shall have priority over liens already recorded. Fosdick v. Schall, 99 U. S. 235 (1878); Southern R. R. v. Carnegie Steel Co., 76 Fed. 492 (1896); St. Louis R. R. Co. v. O'Hara, 177 Ill. 525 (1899). If the current receipts applicable to the payment of such certificates have been diverted to discharge mortgage liens, equity will require a restoration. Burnham v. Bower, 111 U. S. 776 (1884); Finance Co. v. Charleston R. R. Co., 48 Fed. 188 (1891). Certificates can be issued only to cover expenses necessary to keep the railroad a going concern, hence those issued to the president of the company for arrears in salary have no priority. National Bank v. Carolina, *etc.*, R. Co., 63 Fed. 25 (1894); Addison v. Lewis, 75 Va. 701 (1881). Likewise, rentals accruing under the railroads' leases of other lines prior to appointment of receiver are unsecured liabilities, even though a certain percentage of the receipts was to be paid to the lessor company by the terms of the lease. New York Railway Co. v. L. E. and W. R. Railway, 58 Fed. 268 (1893); Sunflower Oil Co.

v. Wilson, 142 U. S. 313 (1892). In appointing a receiver the court may decree a preference as to debts for operating expenses incurred within a limited time prior to receivership, the period most generally adopted being six months. Waring v. Union Trust Co., 117 U. S. 434 (1885); Lee v. Penna. Traction Co., 105 Fed. 405 (1900); Farmers Loan Co. v. Telegraph Co., 148 N. Y. 315 (1896). But the particular circumstances of a case may lead the court to fix a different period. Miltenberg v. Logansport Railway Co., 106 U. S. 288 (1882); Central Trust Co. v. East Tenn. Railway, 80 Fed. 624 (1897). Tort claims due to negligence of employees of the railroad are not entitled to any preference if they arose before the receivership. Cable Railway Co. v. Drake, 84 Fed. 257 (1897); Barnett v. East Tenn. Railway, 48 S. W. 817 (Tenn. 1898); but such claims arising after appointment of receiver are regarded as operating expenses and entitled to preference as such. Anderson v. Condict, 93 Fed. 349 (1899); Green v. Coast Line Co., 97 Ga. 15 (1895); Klein v. Jewett, 26 N. J. Eq. 474 (1875). As a general rule a debt incurred for new construction work has no preference over a recorded lien. Wood v. Guarantee Trust Co., 128 U. S. 416 (1888); Illinois Savings Co. v. Dowd, 105 Fed. 123 (1900); although the court may give such debts priority by authorizing the construction of a new line where absolutely necessary in order to render the old portion productive. Shaw v. Railroad Co., 100 U. S. 605 (1879); Credit Co. v. Arkansas Cent. Rwy., 15 Fed. 46 (1882).

The foregoing principles have also been applied in the case of gas, water, irrigation and other corporations of a quasi public character. Kent v. Canal Co., 144 U. S. 75 (1891); Keelyn v. Telegraph Co., 90 Fed. 29 (1898); Ellis v. Light Co., 86 Tex. 109 (1893). With regard to private corporations, as is shown by the principal case, it is not essential to the public interest that they be kept going concerns; hence a receiver cannot issue certificates having a preference over existing liens. Hanna v. State Trust Co., 70 Fed. 2 (1895); Hendrie Mfg. Co. v. Parry, 37 Colo. 359 (1906); Investment Corporation v. Portland Hospital, 40 Ore. 523 (1901). However, the court may authorize such preferences, even in the case of private corporations, for expenditures incident to administering the assets and preserving the property during the winding up of the business. Highland Co. v. Thornton, 105 Ala. 225 (1894); Peoples Bank v. Textile Co., 104 Va. 34 (1905).

CRIMINAL LAW—EMBEZZLEMENT—DRAFTS—The cashier of a bank drew a check on his own bank to pay a personal debt. The check was sent to another bank in the same town for collection. On clearing the balance due the collecting bank, made up mostly of the check in question, was paid for by a draft on an outside bank, which was paid in due course. The check was never charged to the cashier's account. *Held:* There was not an embezzlement of the draft. State v. Wilcox, 179 S. W. 482 (Mo. 1915).

As embezzlement is a creature of statute, a person can be convicted of it only upon proof of the embezzlement of some of the specific property mentioned in the statute. Generally, however, the terms of the statutes are very broad. It has been held that under the general term "property," negotiable municipal bonds, as yet unissued, were the subject of embezzlement. Bork v. People, 91 N. Y. 5 (1883); State v. White, 66 Wis. 343 (1886). Generally promissory notes and other evidences of debts are made the subject of embezzlement. State v. Orwig, 24 Ia. 102 (1867). But under a statute which provided that "bank bills or notes" should be the subject of embezzlement, the embezzlement of a promissory note was held not to be an offence within the meaning of the act. State v. Stimson, 24 N. J. L. 9 (1853). Under statutes making checks the subject of embezzlement, an undelivered check may be embezzled. Livingston v. Fidelity & Deposit Co., 27 Ohio C. C. 662 (1905). And an unindorsed check payable to order. State v. McClellan, 82 Vt. 361 (1909); Burrows v. State, 137 Ind. 474 (1893).

The Missouri statute provides that evidences of debt may be the sub-

ject of embezzlement, but distinguishes between evidences of debt "negotiable by delivery only," and those not "negotiable by delivery only." The decision in the principle case was based on the ground that a draft drawn to order in the hands of the drawer did not fall within the former class.

CRIMINAL LAW—PREPARATION FOR COMMISSION OF CRIME—DISTINCTION BETWEEN INTENT AND ATTEMPT—With intent to obtain money by false pretenses, the prisoner had carried through the fraudulent device, but owing to police intervention had made no actual claim for the money. *Held:* His acts constituted mere preparation and there was consequently no attempt. Rex v. Robinson, 113 L. T. R. 379 (England, 1915).

The general rule is that mere intent is not enough to convict one of an attempt to commit a crime; that some act immediately, rather than remotely connected with it is essential. Regina v. Eagleton, 6 Cox C. C. 559 (Eng. 1855); Com. v. Peaslee, 177 Mass. 267 (1901); Stabler v. Com., 95 Pa. 318 (1880). The difficulty consists in determining where preparation ends and the attempt begins. Regina v. Roberts, 7 Cox C. C. 39 (1855). It was held in that case that gathering the metal and dies, intending but not actually starting to coin would not be an attempt to counterfeit. It has been held that the attempt begins with the direct movement towards the commission after the preparations are made. People v. Murray, 14 Cal. 160 (1859). Similarly if the defendant has done the last act depending on himself and the intervention is from without. Reg. v. Eagleton, *supra;* Regina v. Cheeseman, Leigh and C. 140 (1862). The latter case held an act "close to the point of completion" was sufficient. It has been held that the act need not be the last proximate act towards the consummation of the intended crime. People v. Sullivan, 173 N. Y. 122 (1903); but it is sufficient if it be an act apparently adopted to produce the result intended. Com. v. Glover, 86 Va. 382 (1889). (But see the dissenting opinion in the former case.) The last act done need be only the "beginning of the attempt." Rex v. White, 102 L. T. R. 784 (Eng. 1910).

But where a statute goes further and provides: "and in such attempt shall do any act toward the commission of such offense" an act remote from the crime has been held to constitute an attempt. People v. Bush, 4 Hill 133 (N. Y. 1843).

The better view is that merely soliciting one to do an act is not an attempt to do that act. Com. v. Stabler, *supra,* but there are authorities to the contrary. McDermott v. People, 5 Park C. R. 102 (N. Y. 1860); Griffin v. State, 26 Ga. 493 (1848). It has been pointed out that attempt implies the intent, but that intent does not imply attempt. Rex v. Linneker, 94 L. T. R. 856 (Eng. 1906).

CRIMINAL LAW—RIGHT OF COUNSEL—WAIVER—A party accused of a crime appeared without counsel, but informed the court he was ready for trial and actively proceeded to conduct his own defense. *Held:* The defendant waived his right to demand the assignment of counsel by the court. Gatlin v. State, 87 S. E. 151 (Ga. 1915).

The accepted rule is that a defendant in a criminal case has the constitutional right to have the benefit of counsel, but that this right may be waived. Kerr v. State, 35 Ind. 288 (1871). The rule obtains even where accused is himself a practising attorney. People v. Napthaly, 105 Cal. 641 (1895). The duty to appoint counsel arises only on defendant's application showing an inability to employ such representative, State v. Whitesides, 49 La. Ann. 352 (1897); and it has been held that where the prisoner is able to pay it is not the court's duty even when requested. State v. Terry, 201 Mo. 697 (1907).

It is also the general rule that the selection is within the discretion of the court. This is as to the number assigned, Carr v. State, 21 Ohio Cir. Ct. R. 43 (1900), as well as the ones selected. People v. Fuller, 71

N. Y. S. 487 (1901). The accused can not reject the court's choice and subsequently allege error. Stokes v. State, 73 Ga. 816 (1884).

It has been held counsel so assigned must be present at such proceedings as would work injury to his client were he not in attendance. State v. Meagher, 49 Mo. App. 571 (1892). But this does not apply to the mere handing in of the verdict if defendant himself be present. Hammer v. State, 85 Md. 562 (1897); Martin v. State, 79 Wis. 175 (1891).

DEEDS—DELIVERY TO THIRD PERSON TO HOLD UNTIL GRANTOR'S DEATH—A decedent executed a deed for certain premises and gave it to his lawyer with instructions to deliver it to the grantee after the decedent's death. *Held:* The delivery was valid. Gomel v. McDaniels, 109 N. E. 996 (Ill 1915).

The principal case is a good illustration of the general rule. A deed may be delivered to a third person, to be delivered to the grantee after the grantor's death, and the delivery is valid even if the grantee did not know of the existence of the deed; provided that at the time of the delivery to the third person the grantor intended to part with all dominion and control over the deed. Grilley v. Atkins, 78 Conn. 380 (1905); Rowley v. Bowyer, 75 N. J. Eq. 80 (1908); Kittoe v. Willey, 121 Wis. 548 (1904). But in case the grantor reserves the right to control or recall the deed there is no delivery. Tarwater v. Going, 140 Ala. 273 (1904); Cole v. Cole, 144 Mich. 676 (1906). That is so even if the grantor should die before exercising his right to recall the deed, and the third person gave the deed to the grantee. Brown v. Brown, 66 Me. 316 (1876); Cook v. Brown, 34 N. H. 46 (1857). Once the grantor has parted with the dominion and control over the deed, he cannot revoke it, and the mere fact that he happens to recover the deed does not destroy the conveyance to the grantee. Foreman v. Archer, 130 Ia. 49 (1906); Robbins v. Rascoe, 120 N. C. 79 (1897); Rankin v. Donovan, 166 N. Y. 626 (1901).

Whether the grantor intended a complete and unconditional delivery when placing the deed in the hands of the third person, is a question of fact, in the solution of which all the circumstances surrounding the transaction may be shown. Bruner v. Hart, 59 Fla. 171 (1910); Kittoe v. Willey, *supra*.

DIVORCE—REFUSAL OF SEXUAL INTERCOURSE—A wife persisted in observing a "purity pact," which she had made with her husband for twelve years. *Held:* Refusal of sexual intercourse did not constitute grounds for divorce as desertion or cruel and barbarous treatment. Cunningham v. Cunningham, 60 Pa. Super. Ct. 622 (1915).

It is still an open question whether unjustifiable refusal of sexual intercourse is a ground for divorce. The majority of jurisdictions are opposed to granting a divorce, saying that there is no wilful desertion. Fritz v. Fritz, 138 Ill. 436 (1890); Snouffer v. Snouffer, 129 N. W. 326 (Ia. 1911); Prall v. Prall, 58 Fla. 496 (1909); or that it is not abusive treatment. Stewart v. Stewart, 78 Maine 548 (1897); Cowles v. Cowles, 112 Mass. 298 (1873). See also Wacker v. Wacker, 55 Pa. Super. Ct. 380 (1913). Other jurisdictions hold that the marital relation is effectually terminated by a refusal of sexual intercourse. Pinnebad v. Pinnebad, 68 S. E. 73 (Ga. 1910); Raymond v. Raymond, 79 Atl. 430 (N. J. Ch. 1909). But the refusal must be persistent. Hayes v. Hayes, 144 Cal. 625 (1904). And if the husband does not supply adequate support, he is not entitled to divorce for refusal of sexual intercourse. Oertel v. Oertel, 90 Atl. 1006 (N. J. 1914).

EVIDENCE—CONSPIRATORS—DECLARATIONS—A real estate agent and the vendee conspired together in effecting a land sale. *Held:* The declarations made in the prosecution of the joint undertaking were admissable in proof against the co-conspirator. Cole v. Collins, 179 S. W. 607 (Ky. 1915).

The rule is that the declarations of one co-conspirator made during the progress and in the prosecution of the joint undertaking or accompanying and explaining acts done in furtherance of it are evidence against his fellow-conspirators. Com. v. Crowninshield, 10 Pick (Mass.) 497 (1830); Clinton v. Estes, 20 Ark. 216 (1859). Such declarations must form part of the *res gestae* to be so admissible. Clinton v. Estes, *supra;* Benford v. Sanner, 40 Pa. 9 (1861). The existence of the conspiracy at the time of the making of the declarations must first be shown by other evidence. Hellman v. Somerville, 212 Mo. 415 (1908); Davis v. Keene, 23 Me. 69 (1843). But it has been held this rule may be relaxed in so far as it affects only the more effective presentation of the facts or the order of proof. People v. Compton, 123 Cal. 403 (1898); State v. Bolden, 109 La. 484 (1903). It is likewise a settled rule that even if a conspiracy is established the declarations are inadmissible if made after the accomplishment or abandonment of the common design. Clinton v. Estes, *supra;* Benford v. Sanner, *supra.* It has been held that the statements of any and all persons in a mob or riotous assembly, whether identified or not, become a proper subject for consideration as against the proven leader and instigator. Redford v. Birley, 3 Starke 87 (Eng. 1820); Brenan v. People, 15 Ill. 511 (1854). So the same principle carried through on the civil side makes the admissions of one joint-tortfeasor receivable against another. R. v. Hardwicke, 11 East 578 (Eng. 1809).

EVIDENCE—CONTRIBUTORY NEGLIGENCE—HABITUAL CONDUCT—In an action for death from being struck by a street car, there being no eye-witnesses, the court admitted evidence of the habits of the deceased as to care, caution and prudence, to prove the exercise of due care. *Held:* Proof of habitual care was sufficient to raise the presumption of due care at the time of the accident. Casey v. Chicago Rys. Co., 109 N. E. 984 (Ill. 1915).

Some courts have held that in an action to recover for the killing of a person at a railway crossing, evidence of the habits of the deceased on approaching railroad crossings is admissible. Toledo, St. Louis & Kan. City R. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089 (1893); Mo. Pac. R. Co. v. Moffatt, 60 Kan. 113 (1899); Bourassa v. Grand Trunk R. Co., 74 Atl. 591 (N. H. 1909). In at least one state such evidence has been limited to general habits of the deceased in reference to the particular crossing. Frederickson v. Iowa Central R. R. Co., 156 Ia. 26, 135 N. W. 12 (1912). But evidence of habitual care is insufficient when there are eye-witnesses competent to testify in reference to the care exercised on the particular occasion. Golinvaux v. Burlington, *etc.*, Co., 125 Ia. 652, 101 N. W. 465 (1904); Zucker v. Whitridge, 205 N. Y. 50, 98 N. E. 209 (1912), even though they cannot testify regarding the instant of the accident. Cox v. Chicago, *etc.*, R. Co., 92 Ill. App. 15 (1900). Other courts have held that evidence of the general character and habits of carefulness of the deceased is not evidence of due care. Chase v. Maine Central R. Co., 77 Me. 62 (1885); Parsons v. Syracuse, *etc.*, R. Co., 205 N. Y. 226 (1912).

EVIDENCE—FORCE OF DIRECT TESTIMONY UNIMPEACHED—In a trial for embezzlement, no direct testimony was offered to contradict the prisoner's statement that the transaction was personal. *Held:* The unimpeached testimony of the prisoner could not be disregarded. People v. Davis, 110 N. E. 9 (Ill. 1915).

As regards oral testimony, it is a general rule that the testimony of an unimpeached witness cannot be disregarded. Quock Ting v. U. S., 140 U. S. 417 (1891); Podolski v. Stone, 186 Ill. 540 (1900). At any rate such testimony cannot be disregarded wilfully or from caprice. Larson v. Glos, 235 Ill. 584 (1908). But there are so many circumstances that may make oral testimony unreliable, that even though unimpeached, it must sometimes be ignored. The testimony may be inherently improbable. Clopton v. Com.,

62 S. E. 1022 (Va. 1909); Wainscott v. State, 8 Okl. Crim. 590 (1913). Yet unimpeached testimony can not be disregarded merely because it is ordinarily regarded as improbable. Ford v. State, 78 S. E. 782 (Ga. 1913). The testimony of the witness may be contradictory, or his manner may raise doubts as to his sincerity. Norton v. U. S., 205 Fed. 593 (1913). Though not contradictory in itself, the testimony may not harmonize with the balance of the evidence. People v. Mindeman, 157 Mich. 120 (1909). Or the witness may have such interest in the issue as to discredit his testimony. Clopton v. Com., *supra*.

EVIDENCE—PAROL TESTIMONY TO SHOW THAT CONTRACT WAS EXECUTED SOLELY TO INFLUENCE CONDUCT OF THIRD PERSON—In a suit on a written contract made by owners of stock of a corporation, the defendant introduced parol evidence to show that the contract was never to be performed, but was a mere sham to influence third owner to sell his interest. *Held:* Such evidence was admissible. Coffman v. Malone, 154 N. W. 726 (Neb. 1915).

Where it was mutually understood that the document was to serve the purpose of a mere sham, there is no violation of the general parol evidence rule in admitting parol testimony to exonerate the makers from the enforcement of the written instrument. Robinson v. Nessel, 86 Ill. App. 212 (1899); So. Street Rwy. Advertising Co. of Balto. v. Metropole Shoe Mfg. Co. of Balto., 91 Md. 61, 46 Atl. 513 (1900). But some courts exclude such evidence when the pretence, adopted to influence the conduct of the third person, is morally unjustifiable. Graham v. Savage, 110 Minn. 510, 126 N. W. 394 (1910); Grand Isle v. Kinney, 70 Vt. 38 (1898), while others make no such distinction. Nightingale v. J. H. & C. K. Eagle, 126 N. Y. S. 339, 141 N. Y. App. Div. 386 (1910); Humphrey v. Timken Carriage Co., 12 Okla. 413, 75 Pac. 528 (1904). The instance case must be carefully distinguished from one in which the object in offering parol evidence was to show that a legal, written contract was not to be enforced according to its terms. Riley v. International Banana Food Co., 185 Ill. App. 629 (1914); Solomon v. Stewart, 151 N. W. 716 (Mich. 1915); Holt v. Gordon, 174 S. W. 1097 (Tex. 1915).

EVIDENCE—PEDIGREE—In a prosecution for rape, testimony of the prosecutrix's adoptive parents as to her age and the date of her birth, made upon information by her aunt, who was dead at the time of the trial, was admissible. State v. Tetrault, 95 Atl. 669 (N. H. 1915).

Matters of pedigree consist of descent and relationship evidence by declarations of particular facts, such as births, marriages, and deaths, and is a well settled exception to the rule excluding hearsay evidence. 1 Greenleaf Ev. § 104; Stein v. Bowman, 38 U. S. 209 (1839); 61 UNIV. OF PENNA. L. REV. 417. The declarant must have been related by blood or affinity to the pedigree in question, Rollins v. Atlantic City R. Co., 73 N. J. L. 64 (1905); must be dead, Faulkerson v. Holmes, 117 U. S. 389 (1886); and the declarations must have been made before the beginning of the controversy, Pilkerton v. Roberson, 110 Va. 136 (1909). In England the rule is limited strictly to cases involving pedigree and does not apply to proof of the facts which go to make it up, when they have to be proved for other purposes. Haines v. Guthrie, L. R. 13 Q. B. D. 818 (1884). Generally in this country the rule goes further, and these facts may be proved in that manner in any case where they become material. Hurlburt Est., 68 Vt. 366 (1895). When the questions of birth, parentage, age, or relationship are merely incidental the case is not one of pedigree, Eisenlord v. Clum, 126 N. Y. 552 (1891); but, by the weight of authority, hearsay is admissible, North Brookfield v. Warren, 16 Gray 171 (Mass. 1860). However, the weight of authority is opposed to its admissibility when pedigree is neither directly nor indirectly involved. Bowen v. Insurance Co., 68 App. Div. 342 (N. Y.

1902). So age is not ordinarily an element of pedigree, Connecticut Ins. Co. v. Schwenk, 94 U. S. 593 (1876); and in People v. Mayne, 118 Cal. 516 1897), age of the female though involved in the issue, did not constitute it a case of pedigree. But quite a few states permit the application of the pedigree exception to hearsay in actions where pedigree is not the issue. This is most usual in questions of age, as the age of the maker of a note, Houlton v. Manteuffel, 51 Minn. 185 (1892); Watson v. Brewster, 1 Pa. 381 (1845); and the age of a minor to whom liquor was illegally sold, State v. Best, 108 N. C. 747 (1891). The date of birth, recorded in the family Bible, was held admissible. State v. Hazlett, 14 N. Dak. 490 (1905). In Texas, declarations of relatives are admissible to prove facts of death, birth, and marriage, in all cases under the same limitations as would apply in a case of pedigree. Summerhill v. Darrow, 94 Tex. 71 (1900). The principal case is in accord with these latter states in permitting the introduction of hearsay, according to the rules of pedigree, when pedigree itself is not an issue. See 62 UNIV. OF PENNA. L. REV. 318.

JUDGMENTS—RES JUDICATA—CRIMINAL JUDGMENT—In a suit by the plaintiffs upon a policy of fire insurance the defendants offered to file an answer showing that the plaintiff had been convicted of wilfully burning the building upon which the policy had been issued and pleaded the conviction as a bar to plaintiff's demand. *Held:* The trial court was correct in refusing to permit such answer to be filed. Liverpool and London Ins. Co. v. Wright, 179 S. W. 49 (Ky. 1915).

It is fundamental that one is not bound by an adjudication in a former suit upon the same subject matter unless a party or privy to that action. Commonwealth v. City of Newton, 186 Mass. 286 (1904); Lehigh Zinc Co. v. New Jersey Zinc Co., 55 N. J. L. 350 (1893). It is also well settled that estoppels must be mutual and that a party will not be concluded by a former judgment unless he could have used it as a defense or as the foundation of a claim had the judgment been the other way. Penfield v. Potts, 126 Fed. 475 (1903); Allred v. Smith, 135 N. C. 443 (1904). Therefore, as is shown in the principal case, a judgment in a criminal prosecution is no bar to a subsequent civil action arising from the same transaction and is not even competent evidence in the civil action. Marceau v. Travellers Ins. Co., 101 Cal. 338 (1894); Betts v. New Hartford, 25 Conn. 180 (1856); Cottingham v. Weeks, 54 Ga. 275 (1875). The record of a judgment rendered in a criminal case upon a plea of guilty is admissible in a civil action as a judicial confession of the fact. Young v. Copple, 52 Ill. App. 547 (1893); Green v. Bedell, 48 N. H. 546 (1869); the plea of guilty, however, is not conclusive and the defendant may show that he is not in fact guilty of any offense. Crawford v. Bergen, 91 Iowa 675 (1894); Johnson v. Girdwood, 28 N. Y. Sup. 151 (1894); Clark v. Irvin, 9 Ohio St. 131 (1839). A judgment in a criminal prosecution is admissible in evidence in a subsequent civil suit where the mere fact of a conviction or acquittal becomes a relevant circumstance to prove that fact. Holcomb v. Cornish, 8 Conn. 374 (1831); Commonwealth v. Evans, 101 Mass. 25 (1869); Quinn v. Quinn, 16 Vt. 426 (1844).

The rule seems to be that a judgment in a criminal action is a bar to a later civil action involving the same matter when the state appears as plaintiff. Stone v. United States, 167 U. S. 178 (1897); United States v. Jaedicke, 73 Fed. 100 (1896); although it has been held otherwise. Iowa v. Meek, 112 Iowa 338 (1900). When a suit is brought to recover a penalty or forfeiture, set forth as a punishment for the crime of which the defendant has been acquitted, then a record of such acquittal will bar the suit. Coffey v. United States, 116 U. S. 436 (1885); United States v. Seattle Brewing Co., 135 Fed. 597 (1905); *contra.* People v. Aernam, 90 App. Div. 422 (N. Y. 1904).

It is universally recognized that a judgment on the merits in a court

of law is conclusive as to all issues litigated in a subsequent proceeding between the same parties in equity, and conversely. Codde v. Moheat, 109 Mich. 186 (1896); Phillips v. Pullen, 45 N. J. Eq. 830 (1889); Stickney v. Goudy, 132 Ill. 213 (1890); except as to claims and defenses which were of a purely equitable character. Hills v. Sherwood, 48 Cal. 386 (1874); Merritt v. Gill, 68 Ga. 209 (1881).

MANDAMUS—WHEN WRIT ISSUES—In an action for damages, the circuit court quashed the returns upon the summonses, on the ground that the defendant was not served; whereupon the complainant asked the court of appeals to issue a writ of mandamus ordering the judge of the circuit court to try the case on its merits. *Held:* The writ should not issue. Speckert v. Ray, 179 S. W. 592 (Ky. 1915).

The writ of mandamus cannot be issued to compel an inferior court to decide a matter in any particular manner. *Ex parte* Denver & R. G. Rwy. Co., 101 U. S. 711 (1879). It may be issued to compel performance of a ministerial act, but not to control discretion. Common. v. McCrone, 153 Ky. 296 (1913); U. S. v. Schurz, 102 U. S. 378 (1880). If there be a refusal to act upon the subject, on which discretion is to be exercised, the writ may be used to enforce action, but when the question has been passed upon, it will not be used for purposes of correcting the decision. Trustees v. McCrory, 132 Ky. 89 (1909); Dunlap v. Black, 128 U. S. 40 (1888). In some states, where a court declines jurisdiction by mistake of law, and not as a decision upon facts, and refuses to proceed or dispose of the case, a mandamus to proceed has been issued by a superior court. Cahill v. Superior Court, 145 Cal. 42 (1904). In some of the cases, a distinction is made between a refusal to take jurisdiction, *ab initio,* and a judicial determination that there is no jurisdiction,—a writ of mandamus being allowed in the former case, and not in the latter. People v. Garnett, 130 Ill. 340 (1889); State v. Smith, 105 Mo. 6 (1891). But a writ of mandamus will not issue to review the decision of a lower court, which has refused jurisdiction after a determination of a question of fact. New Central R. R. Co. v. District Court, 21 Nev. 409 (1893). The writ of mandamus cannot be used to perform the office of an appeal, or writ of error. *In re* Key, 189 U. S. 84 (1902); and it is never granted where the party asking it has another remedy. *In re* Morrison, 147 U. S. 14 (1893)

MARRIAGE—COMMON LAW MARRIAGE—COHABITATION—A marriage license signed in blank by a judge of probate was issued to and filled out by a justice of the peace, who performed what he thought was a valid ceremony. *Held:* The marriage was invalid, both as a statutory marriage because a judge's discretion to issue licenses is not delegable, and as a common law marriage because not consummated by cohabitation. Herd v. Herd, 69 So. 885 (Ala. 1915).

All the authorities agree that a contract to marry made *per verba de futuro cum copula* with intent to consummate constitutes a valid common law marriage. Marks v. Marks, 108 Ill. App. 371 (1903); Lorimer v. Lorimer, 124 Mich. 631 (1900); Cheney v. Arnold, 15 N. Y. 345 (1857). But where the contract is made *per verba de praesenti,* the authorities are in hopeless conflict. Some states hold that the words themselves constitute a valid common law marriage. State v. Walker, 36 Kan. 297 (1887); Davis v. Davis, 7 Daly 308 (N. Y. 1887); Richard v. Brehm, 73 Pa. 140 (1873), but in point of number the majority follow the contrary rule of the principal case. U. S. v. Route 33, Fed. 246 (1873); Peet v. Peet, 52 Mich. 464 (1884); Dyer v. Brannock, 66 Mo. 391 (1877); Carmichael v. State, 12 Ohio St. 553 (1861). A marriage valid at common law is valid despite state statutes prescribing form and solemnization of marriage, unless they contain express words of nullity. Meister v. Moore, 96 U. S. 76 (1877); Snuffer v. Karr, 94 S. W. 983 (Mo. 1906). There are a few states, how-

ever, that do not recognize the validity of common law marriages. Western Union Tel Co. v. Proctor, 6 Tex. Civ. App. 300 (1894); *In re* Smith's Estate, 30 Pac. 1059 (Wash. 1892); Beverlin v. Beverlin, 29 W. Va. 732 (1887).

MASTER AND SERVANT—LIABILITY OF MASTER FOR SERVANT'S ACTS—A servant was employed to bend rails and in so doing acted in a wilfully reckless manner, thereby causing injury. *Held:* The master was liable for the act of the servant done in the course of his employment and in the furtherance of the master's business, even though it was done in a manner not ordered and wilfully and maliciously. Hellriegel v. Dunham, 179 S. W. 763 (Mo. 1915).

It is a universal rule that for the master to be liable at all the act must be in the scope of employment. Bowler v. O'Connell, 162 Mass. 319 (1894); Holler v. Ross, 68 N. J. L. 324 (1902); Lima Ry. v. Little, 67 Ohio St. 91 (1902). If done in the course of employment, the master is liable in all jurisdictions for negligent acts. Brudi v. Luhrman, 26 Ind. App. 221 (1901); Price v. Simon, 62 N. J. L. 153 (1898). And even though there be a deviation from instructions, the master is generally liable. Dinsmoor v. Wolber, 85 Ill. App. 152 (1899); Pitts. Ry. v. Kirk, 102 Ind. 399 (1885); McClung v. Dearborne, 134 Pa. 396 (1890). When the act is wilful and malicious there is a split of authority, although the modern tendency is to hold the master liable as in the principal case, less importance being put on the motive. 2 Mechem: Agency, § 1929 *ff.;* Seymour v. Greenwood, 6 H. & N. 359 (Eng. 1861); Balt. Ry. v. Pierce, 89 Md. 495 (1899); Chi., *etc.*, Ry. v. Kerr, 74 Neb. 1 (1905); Stranahan v. Coit, 55 Ohio St. 398 (1896): According to the older rule, by acting maliciously, the servant ceased to be in the course of his employment; this is now the minority view. Ducre v. Sparrow-Kroll Lumber Co., 163 Mich. 53 (1911); Wright v. Wilcox, 19 Wend. 343 (N. Y. 1838). But see Levy v. Ely, 48 App. Div. 554 (N. Y. 1900) which is in accord with the principal case, although it does not specifically overrule Wright v. Wilcox, *supra.*

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY TO SERVANT—A laborer, employed by a railroad to cut grass along its right of way, became infected by poison ivy, which resulted in blood-poisoning and congestion of the lungs, from which he died. *Held:* His wife could recover on an insurance policy covering death by external, violent and accidental means. Plass v. Central New Eng. Rwy. Co., 155 N. Y. S. 854 (1915).

An accident is an unlooked for and untoward event which is not expected or designed. Bryant v. Fissell, 86 A. 458 (N. J. 1913). The contact with poison ivy, which results in death, is an accidental death within a policy covering death by external, violent and accidental means. The injury cannot be called an occupational disease. Rwy. Ass'n v. Dent, 213 Fed. 981 (1914). The phase "injury by accident" in the English Workmen's Compensation Act was held by the House of Lords to include an infection with anthrax from handling wool. Brintons v. Turvey [1905] A. C. 205. But it has been held in this country that death resulting from becoming infected with anthrax was not "accidental" within the terms of a policy insuring against death from external, violent and accidental means. Bacon v. U. S. Mut. Acci. Asso., 123 N. Y. 304 (1890). See also Preferred Acci. Ins. Co. v. Robinson, 45 Fla. 525 (1903). The findings of fact by the Workmen's Compensation Commission cannot be reviewed on appeal. Paper Co. v. Industrial Com., 141 N. W. 1013 (Wis. 1913); Appeal of Hotel Bond Co., 89 Conn. 143 (1915); Pigeon's Case, 216 Mass. 51 (1913).

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DUTY OF PEDESTRIAN CROSSING CITY STREET—A person who alighted from a car at a crossing, took several steps towards the curb and was struck by a team. *Held:* One who crosses a city street without any exercise of his faculty of sight is negligent as a matter of law. Knapp v. Barrett, 110 N. E. 428 (N. Y. 1915).

The rule applicable to steam railroads is not applicable to other crossings. The vigilance does not have to be so extreme and constant. Donovan v Bernhard, 208 Mass. 181 (1911). It is not necessary to stop and listen before attempting to cross a city street where moving vehicles are numerous, but a failure to look is not an exercise of reasonable care. Barker v. Savage, 45 N. Y. 191 (1871). So it was held to be negligence as a matter of law in a traveler carrying an umbrella to cross a public street without looking, Dimuria v. Seattle Transfer Co., 50 Wash. 633 (1908); or for one wearing his ear cap pulled down and his coat collar turned up, to cross, looking straight ahead, Peterson v. Ballantine, 205 N. Y. 29 (1912). The pedestrian is bound to look. Gallagher v. Kahn, 223 Pa. 451 (1909). But the law does not say how often he must look, or precisely how far, or when, or from where. This is a question for the jury under all the circumstances. So, one alighting from a car and starting across the street, if he looked when he started, he need not as a matter of law look constantly again. Patton v. Morrin-Powers Co., 231 Mo. 298 (1910). Even if one sees a vehicle approaching he need not stop; and whether he is negligent in going forward under the circumstances of the distance will be a question for the jury. McAweeny v. Journal Printing Co., 114 Minn. 262 (1911). If he has used his eyes, and has miscalculated his danger, he may still be free from fault. Talbot v. Ginacchio, 18 Cal. App. 390 (1912); McAvoy v. Brewing Co., 78 N. J. L. 633 (1910). But a pedestrian is not at liberty to close his eyes in crossing a city street. He is guilty of contributory negligence, as a matter of law, where he was struck by the side of a vehicle which he apparently walked into blindly. Hensen v. Arthur, 217 Pa.' 156 (1907). And, although one testifies he looked both ways before attempting to cross a public street, he is guilty of contributory negligence if it appears he would have seen an approaching vehicle had he looked. Banner v. O'Meara, 110 N. Y. S. 947 (1908). However, Massachusetts has held that a failure to look is not contributory negligence, as a matter of law, in the absence of evidence that it might have been seen if he had looked, the whole question being for the jury. Shapleigh v. Wyman, 134 Mass. 118 (1883); Williams v. Grealy, 112 Mass. 79 (1873).

NEGLIGENCE—LIABILITY OF COUNTY—The officers of a county permitted the steps of the courthouse to become defective, and were negligent in having the pavement about the courthouse cleared. As a result, a person received injuries and sought to hold the county. *Held:* The county is not liable for the negligence of its officers except by statutory provision imposing such liability. McDermott v. Commissioners of Del. Co., 110 N. E. 237 (Ind. 1915).

This is in entire accord with the great weight of authority. Smith v. Carlton Co. Com'rs., 46 Fed. 340 (1891); Symonds v. Clay Co., 71 Ill. 355 (1874); Hughes v. Monroe Co., 147 N. Y. 49 (1895). But it has been held that if the act was unauthorized by law and not repudiated by the county, that liability would result. Viebahn v. Crow Wing Co., 96 Minn. 276 (1905). But where there is a duty imposed by statute—especially in the case of bridges—three states hold that there is an implied liability. Cooper v. Mills Co., 69 Ia. 350 (1886); Anne Arundel Co. v. Carr, 111 Md. 141 (1909); Gehringer v. Lehigh County, 231 Pa. 497 (1911). Even one of these states, however, has refused to extend this implied liability to the case of a courthouse; or indeed any further than bridges and roads. Kincaid v. Hardin Co., 53 Ia. 430, (1880). For a more detailed discussion of county liability see note to Hughes v. Monroe, 39 L. R. A. 33, and Shearman & Redfield: Negligence, vol. II (6th ed.), §§ 256 and 257.

NEGLIGENCE—PROXIMATE CAUSE—A horse drawing a carriage in which persons were driving fell against a defective railing of a bridge, which broke; and in the fall to the tracks below, one of the occupants of the

carriage was killed. *Held:* The proximate cause of a result is that which, in a natural and continued sequence, produces the result and without which it would not have happened. Hocking Valley R. R. v. Helber, 110 N. E. 481 (Ohio 1915).

In defining "proximate cause" the difficulty has been in applying the definition to the facts before the courts; the one given by the principal case has the support of text-book and case. Shearman & Redfield: Negligence, vol. I, § 26; C. & O. R. R. v. Wills, 68 S. E. 395 (Va. 1910). But the weight of authority seems to be against it unless modified in some way. Most courts hold that it is the doing or omitting to do some act, which a person of ordinary prudence could foresee would naturally and probably cause the injury complained of. Hoey v. Felton, 11 C. B. N. S. 142 (Eng. 1861); McGill v. Mich. S. S. Co., 144 Fed. 788 (U. S. 1906); Jenkins v. Carbon Coal Co., 264 Ill. 238 (1914); Brewster v. Elizabeth City, 137 N. C. 392 (1905); Doyle v. S. P. Ry., 108 Pac. 201 (Ore. 1910). The precise injury need not have been foreseen. Jenkins v. Carbon Coal Co., *supra;* Hoag v. R. R., 85 Pa. 293 (1877). The better rule seems to be that it need not be the nearest cause. Chicago R. R. v. Coffee, 126 S. W. 638 (Tex. 1910). But see *contra.* Schwartz v. Shull, 45 W. Va. 405 (1898). The act need not be the beginning cause, but the efficient one. S. Kan. Ry. v. Barnes, 173 S. W. 880 (Tex. 1915).

PATENTS—VALIDITY OF PRICE RESTRICTIONS—The purchaser of a patented article directly convenanted with the patentee to observe certain price restrictions upon resale of the article. *Held:* Such price restriction is valid. American Graphophone Co., *et al.,* v. Boston Store of Chicago, 225 Fed. 785 (1915).

This decision is in accord with the doctrine in force in many of the state courts, that reasonable price restrictions will be upheld. Glurardelli Co. v. Hunsicker, 128 Pac. 1041 (Cal. 1912); Garst v. Harris, 177 Mass. 72 (1902); Fisher Flouring Mills Co. v. Swanson, 137 Pac. 144 (Wash. 1913). Where, however, such restrictions have for their purpose the maintenance of excessive prices and will be detrimental to the public, they are void as contracts in restraint of trade. Arctic Ice Co. v. Franklin Electric Ice Co., 145 Ky. 42 (1912).

Before the Clayton Anti-Trust Act (Pub. Act. No. 212, 63 Cong., p. 3), which applies equally to patented and unpatented articles, such restrictions upon patented commodities were not considered as falling within the Anti-Trust Acts. Dr. Miles Medical Co. v. Park Sons Co., 220 U. S. 373 (1910); Straus v. Am. Publishers' Association, 177 N. Y. 473 (1904). But in the later cases it was held that the restriction may go beyond the point of protecting the patentee and result in an unlawful restraint of trade. Standard Sanitary Manufacturing Co. v. U. S. (Bathtub Trust Case), 226 U. S. 20 (1912); Straus v. Am. Publishers' Association, 231 U. S. 222, 234 (1913). There is a direct conflict among the federal cases as to whether such a restriction is of itself unreasonable without other circumstances. It is held not to be in Bement v. National Harrow Co., 196 U. S. 70 (1904); Victor v. The Fair, 123 Fed. 424 (1903); Henry v. Dick, 224 U. S. 1 (1912); but held to be in Waltham Watch Co. v. Keene, 202 Fed. 225 (1913); Bauer v. O'Donnell (The Sanatogen Case) 229 U. S. 1 (1912); Bobbs-Merrill Co. v. Straus, 210 U. S. 339 (1901); Ford Motor Co. v. Union Motor Sale Co., 225 Fed. 373 (1914); the last on facts exactly similar to the principal case.

The principal case assumes to follow these later cases, but limits their application to resale price restrictions imposed by *notice* attached to the article; and upholds restrictions imposed by *contract* between a patentee and his immediate vendee. The distinction is supported only by loose phrases, not amounting to *dicta,* in the Sanatogen Case, *supra,* and is directly *contra* to the ruling of Ford Motor Co. v. Union Motor Sales Co.,

supra, where in the course of the opinion the distinction is flatly denied. Nor is the distinction between fixing the price of future sales by notice, and so doing by contract with the immediate vendee, supported by any principle in the law of contracts. Railroad v. Fraloff, 100 U. S. 24, 27 (1879); The Majestic, 166 U. S. 375, 384 (1896); Henry v. Dick, *supra.* For a general discussion of the subject, see "The Maintenance of Uniform Resale Prices," 63 UNIV. OF PENNA. LAW REV. 22.

PROCEDURE—PLEADING—CONTRIBUTORY NEGLIGENCE—In an action for personal injuries caused by the alleged negligence of the defendant the answer set up contributory negligence. The plaintiff moved for a bill of particulars. *Held:* The motion should be refused. Bowker v. Donnell, 226 Fed. 359 (1915).

Most American, as well as the Canadian and English, courts hold that the burden of proof of contributory negligence is on the defendant. Railroad Co. v. Gladmon, 15 Wall. 401 (U. S. 1872); Danskin v. Penna. R. Co., 79 N. J. L. 526 (1910); Brown v. White, 206 Pa. 106 (1903); Wakelin v. London & S. W. R. Co., L. R. 12 A. C. 41 (Eng. 1886); Morron v. Can. Pac. Ry. Co., 21 Ont. App. 149 (1894). Other courts hold that the plaintiff to establish his claim must allege and prove his lack of contributory negligence. Swift v. Gaylord, 229 Ill. 330 (1907); Tuttle v. Lawrence, 119 Mass. 276 (1876); Myers v. N. Y. C. & H. R. R. Co., 82 Hun. 36 (N. Y. 1894). In jurisdictions where contributory negligence is a matter of defense, it is generally held that it is an affirmative defense and must be specially pleaded. Bevis v. Telephone Co., 132 Ky. 385 (1909); Schultze v. Mo. Pac. R. Co., 94 Mo. 286 (1887); Duffy v. Atlantic & N. C. R. Co., 144 N. C. 26 (1907). And the acts on which the defendant relies must be set forth in the answer or plea, in the same manner as the plaintiff must aver the acts on which he bases his claim. Railroad Co. v. Shelton, 136 Ala. 191 (1902); Price v. Water Co., 58 Kan. 551 (1897); McInerney v. Chemical Co., 118 Fed. 653 (1902). Some courts allow the defendant to take advantage of contributory negligence under the general denial where it is brought out clearly by the plaintiffs own evidence. Florida East Coast R. Co. v. Smith, 61 Fla. 218 (1911); Chaney v. Railroad Co., 176 Mo. 598 (1903).

In the federal courts the cases are not all in harmony. Following Long Island Railroad Co. v. Darnell, 221 Fed. 194 (1915); and Can. Pac. Ry. v. Clark, 20 C. C. A. 447 (1896); the principle case holds that although the burden of proving contributory negligence is on the defendant, yet he may avail himself of it without pleading it. But in Gadonnex v. New Orleans R. Co., 128 Fed. 805 (1904); and in McInerney v. Chemical Co., *supra,* the opposite view was expressed and it was held that the defense had to be specially pleaded and the facts set forth.

PROPERTY—BAILMENT—INNKEEPER—LIABILITY FOR BAGGAGE—A traveler, unable to secure accommodations at a hotel, agreed to wait until a room should be vacated and left his bag in the custody of the hotel. When he later called for the bag, without having obtained any accommodations, it had been lost. *Held:* It was a bailment for mutual benefit and the hotel was liable for ordinary care. Kleckner v. Hotel Strand, 60 Pa. Super. Ct. 617 (1915).

The ordinary deposit of baggage in a hotel may create either a bailment for hire or a gratuitous bailment. The former class is predicated upon this, that the relation of innkeeper and guest shall have existed at the time of the loss, in which case the innkeeper is liable as an insurer. Crapo v. Rockwell, 95 N. Y. S. 1122 (1905). The relation may be established where baggage is delivered to the innkeeper as the property of an intending guest who, within a reasonable time thereafter actually becomes a guest. The responsibility of the innkeeper relates back to the time when the baggage was delivered. Flint v. Illinois Hotel Co., 149 Ill. App. 404 (1909).

So, even before the guest has registered, the bag, which he has handed the porter as he entered, is held by the innkeeper as insurer. Hill v. Memphis Hotel Co., 124 Tenn. 376 (1911). But where the relation of innkeeper and guest never existed the innkeeper, of course, assumes no such liability. Tulane Hotel v. Holohan, 112 Tenn. 214 (1903). An innkeeper who is merely a gratuitous bailee is not responsible for loss unless guilty of gross negligence. Preston v. Prather, 137 U. S. 604 (1890). If the guest surrenders his room and pays his bill, but leaves baggage in charge of the innkeeper, the latter is only a gratuitous bailee. Hoffman v. Roessle, 31 N. Y. S. 291 (1902). Or where one intending to become a guest delivers his baggage to the porter but changes his plans and does not apply, it is a gratuitous bailment. Baker v. Bailey, 103 Ark. 12 (1912).

The decision in the principal case is placed on a middle ground; the innkeeper's liability is greater than for gross negligence, but less than an insurer. He is liable for ordinary neglect, on the theory that the bailment was reciprocally beneficial to both parties. Benefit to the hotel existed in the possibility of profit to accrue from the patronage of the expected guest. This theory, which seems very applicable, is carried over from cases where a customer in a shop lays aside his wrap in order to "try on" a new garment, and the expected profit or chance of future business is held sufficient consideration to support a bailment for mutual benefit. Bunnell v. Stern, 122 N. Y. 539 (1890); Woodruff v. Painter, 150 Pa. 91 (1892).

SALES—MISREPRESENTATION—The owner of a stallion induced a purchaser to buy through representations that the horse was sound and suitable for breeding purposes, and that certain sores were due to injuries received in the stall, and were of no consequences. The purchaser was ignorant of the nature of the sores and relied on the representations. The sores were in fact symptoms of a disease which made the horse unfit for breeding purposes. *Held:* The purchaser could recover. Maywood Stock Farm Co. v. Pratt, 110 N. E. 243 (Ind. 1915).

It is generally held that a party is not liable for statements which, at the time he made them, be believed to be true. Powell v. Linde Co., 171 N. Y. 675 (1902). But some states hold that where a party assumes to know, and makes unqualified statements of material facts, susceptible of exact knowledge, to induce another to act, if the statements are false and are relied upon by another to his injury, it amounts to fraud which renders the party making them liable therefor to such injured party. Litchfield v. Hutchinson, 117 Mass. 195 (1875). And it is no defense that he believed the statements so made to be true, or that he did not in fact know they were false. Kirkpatrick v. Reeves, 121 Ind. 280 (1889). A party making such statements is also liable if he made them recklessly without knowing whether they were true or false. Taylor v. Commercial Bank, 174 N. Y. 181 (1903). A statement or representation is not fraudulent which is a mere expression of opinion, or relates to facts open to the purchaser as well as to the seller. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 Fed. 888 (1905).

The rule of *caveat emptor* does not apply to statements which relate to matters particularly within the knowledge of the seller, and not so open and apparent as to place the parties on the same footing. Wilson v. Nichols, 72 Conn. 173 (1899). If a seller represents a horse to be sound, it implies that he knows the horse to be sound at the time, and speaks from his own knowledge; and if the horse is not, in fact, sound at the time, the law will impute a fraudulent purpose. Beck v. Goar, 180 Ind. 81 (1913). The owner is bound by statements of fact, made by an agent to sell, to induce a prospective buyer to purchase. Millard v. Smith, 119 Mo. App. 701 (1906).

SPECIFIC PERFORMANCE—MUTUALITY—The grantee of a lot of land covenanted to construct a driveway thereon to be used by the grantor, the

owner of the adjoining lot, so long as friendly relations existed between the parties. The grantee later sold the land, the purchaser buying with notice of the covenant. The grantor now seeks specific performance of the covenant as against both grantees. *Held:* The covenant is terminable at the will of either party and specific performance will not be decreed. Gerling v. Lain, 109 N. E. 972 (Ill. 1915).

A contract to be enforced specifically in a court of equity must be clear, definite and unambiguous, and such that an action at law will lie for a breach thereof. Kent v. Dean, 30 So. 543 (Ala. 1901); Parsons v. Cashman, 137 Pac. 1109 (Cal. 1914). Many courts, especially in the early cases, hold with the principal case, that equity will not enforce a contract if its action may be nullified by the exercise of a discretion which the contract or the law gives the party seeking specific performance. Marble Co. v. Ripley, 10 Wall, 339, 359 (1870); Watford Oil Co. v. Shipman, 233 Ill. 9 (1908); Rust v. Conrad, 47 Mich. 449 (1882). But the modern current of authority is toward the contrary view, and such a contract will be enforced, especially where the entire consideration for the promise has been paid. Guffey v. Smith, 237 U. S. 114 (1914); Phila. Ball Club v. Lajoie, 202 Pa. 210 (1902), and cases cited therein. The party seeking specific performance is held under some of the cases to be estopped by his appearance in a court of equity from exercising his power of terminating the contract. Copple v. Aigeltinger, 167 Cal. 706 (1914). Where, however, both parties have the privilege of withdrawing from the obligations of the agreement, the earlier rule will probably be enforced as in the principal case. Marble Co. v. Ripley, *supra*. Where such are the facts it must be determined whether the parties have entered into a contract binding in a court of law, or whether they have merely "contracted to make a contract if the parties can agree." Weeghan v. Killifer, 215 Fed. 168 (1914). But even in the latter case, where there has been a consideration for the promise, the promissee may have an equitable right to have the promissor endeavor in good faith to enter into binding obligations. Weeghan v. Killifer, 215 Fed. 292 (1914). The latter doctrine, which has been applied in rare cases where an injunction was sought, is scarcely applicable where the complainant seeks direct relief by a bill for specific performance as in the principal case. See also 63 UNIV. OF PENNA. LAW REV. 903.

TORTS—MALICIOUSLY CAUSING DISCHARGE OF EMPLOYEE—Malicious representations of a third person made to an employer to the effect that his employee had assigned his salary caused the latter to be discharged. *Held:* Such third persons was liable for the damage done the injured employee. Scott v. Prudential Outfitting Co., 155 N. Y. S. 497 (1915).

The general rule is that one who maliciously and wilfully causes the discharge of another from the service of a third person is liable to the injured party in damages. Holder v. Cannon Mfg. Co., 135 N. C. 392 (1904); Warschauser v. Brooklyn Furniture Co., 144 N. Y. S. 257 (1913). It does not matter that the employment is terminable at will. Moran v. Dunphy, 177 Mass. 485 (1901); Perkins v. Pendleton, 90 Me. 166 (1897). This factor only affects the amount of damages to which the employee is entitled. Berry v. Donovan, 188 Mass. 353 (1905), and it has been held that the measure of damages is the value of time lost, even though no employment is sought elsewhere. Connell v. Stalker, 45 N. Y. S. 1048 (1897). But where it is actual misconduct which is reported even if inspired by ill-will and a desire to cause the discharge the informant is not liable. Lancaster v. Hamburger, 71 N. E. 289 (Ohio 1904).

It has been held that labor unions can not lawfully procure the discharge of a non-union employee solely on the ground that he is not a member of the union. Berry v. Donovan, *supra*. But it has been held that a threat to strike made by a union thus causing the discharge does not infringe any legal right of the plaintiff or is not an unlawful act. Wunch v. Shankland, 69 N. Y. S. 349 (1901).

TRIAL—DELIBERATION OF JURORS—An official acting as court usher was present in the jury room during the greater part of the time that the jury were deliberating. *Held:* His mere presence was sufficient to invalidate the verdict. Goby v. Wetherill, 113 L. T. 502 (Eng. 1915).

There are very few decisions on this point in England. The holding of the principal case is an extension of the decision in Rex v. Wilmontt, 30 Times L. Rep. 499 (Eng. 1914), where a verdict was vitiated because the jury conversed with the clerk of court in the jury room. On the other hand a verdict was not invalidated where an indisposed juryman left the jury box for over an hour attended by an unsworn bailiff and a doctor. Rex v. Crippen, 103 L. T. 705 (Eng. 1911). The few American decisions on this point are *contra* to the principal case. White v. White, 5 Rawle 61 (Pa. 1835); Williams v. Chicago R. Co., 78 N. W. 949 (S. Dak. 1899). Also a verdict was not invalidated where a court officer asked the jury whether they were likely to agree as he was going home soon. Smith v. State, 78 Ga. 71 (1886). Or because he wrote on a piece of paper. "It is a clear case" and left it in the jury room. Price v. Lambert, 3 N. J. L. 533 (1809). But a verdict will be invalidated if a court officer converses with the jury. Cole v. Swan, 4 Greene 32 (Iowa 1853); Heston v. Neathammer, 54 N. E. 310 (Ill. 1899). Also the presence of a trial judge in the jury room will vitiate a verdict. Gibbons v. Van Alstyne, 9 N. Y. Supp. 156 (1890). But see *contra,* Hart v. Lindley, 14 N. W. 682 (Mich. 1882).